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Supreme Court of the United States

No. 71-322

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH, for Exoneration
From or Limitation of Liability as Owner
of the M/S BREMEN

UNTERWESER REEDEREI, GMBH
Petitioner,
v
ZAPATA OFFSHORE COMPANY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The Opinion of the Court of Appeals (App. 229) is reported at 428 F.2d 888. The En Banc Opinion of the Court of Appeals (App. 283) is reported at 446 F.2d 907.

JURISDICTION

The Judgment of the Court of Appeals on Rehearing En Banc was entered June 28, 1970. (App. 293). The Petition for Writ of Certiorari, filed September 1, 1971, was granted November 9, 1971. The jurisdiction of the Supreme Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is a forum, designated by contract for resolution of disputes by parties of equal bargaining power, *per se* invalid as a violation of any legitimate public policy of the United States?

2. If forum clauses are *per se* valid, did the Court of Appeals commit fundamental error in determining that (a) reasonableness of the clause must be determined solely by exclusive application of *forum non-conveniens,* and (b) in holding that the party seeking to abide by the contract has the burden of showing its reasonableness?

3. In frustrating the contractual expectations of the parties, did the Court below create uncertainty in private international law and distrust of the role of courts in extra-national transactions involving a United States citizen as one party?

STATUTES INVOLVED

No specific statutes, constitutional provisions, or rules of procedure are involved in the determination of the questions presented in this case.

STATEMENT OF THE CASE AND FACTS

This litigation began with a Complaint in Admiralty filed by ZAPATA against BREMEN and its owner, UNTERWESER (hereinafter the "initial action"). ZAPATA's Complaint prayed for damages sustained by the barge CHAPARRAL allegedly caused by the negligence of UNTERWESER and BREMEN while CHAPARRAL was in tow of BREMEN en route to the Adriatic from Venice, Louisiana.[1]

UNTERWESER filed a motion in the District Court requesting that the Court decline jurisdiction of the cause or alternatively stay prosecution of the cause pursuant to a forum provision contained in the Towage Contract. (App. 19). Before this motion was heard by the District Court, UNTERWESER initiated proceedings against ZAPATA in the High Court of Justice, London, England, in accordance with the Towage Contract. Thereafter, the District Court denied Unterweser's Motion for Stay and enjoined further prosecution of the London action.

The Towage Contract

The Towage Contract was the product of an arms-length transaction ". . .made between two responsible

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[1] BREMEN is a deep sea tug of 1200 gross tons, 7500 horsepower, 178 feet in length, 40 feet in beam, built and registered in Germany in 1967, manned by a crew of 23 German nationals. She is owned and operated by Unterweser Reederei, GmbH (Unterweser), a corporation organized under German law and domiciled in Bremen, Germany. CHAPARRAL is a self-elevating drilling barge of 4,750 gross tons, documented at Houston, Texas on January 2, 1968. While under tow, she was manned by a crew and a Master of Zapata Offshore Company (Zapata). CHAPARRAL is 180 feet in length and 205 feet in breadth; she is equipped with three jack-up legs, each 435 feet high. Zapata is a Delaware corporation, with its principal place of business in Houston, Texas.

corporations involved in an international transaction." (App. 246; Opinion, Wisdom, J., dissenting). The voyage contemplated by the Towage Contract was to have traversed numerous jurisdictions from the Mississippi River to the Adriatic Sea, and accordingly was subject to the intermittent civil jurisdiction of numerous sovereigns.

Before contracting for the tow of CHAPARRAL, ZAPATA solicited bids from several ocean-towing companies. UNTERWESER's bid was the lowest. After being advised that its bid had been accepted, UNTERWESER was requested by ZAPATA to furnish a written towage contract for consideration. A contract was drafted by UNTERWESER in Bremen, Germany, and sent to ZAPATA in Houston, Texas. In place of the usual provision for German jurisdiction and German law which UNTERWESER customarily includes in its contracts, UNTERWESER specified an English forum. After consideration of the contract, ZAPATA made several changes, signed the contract in Houston, and returned it to UNTERWESER. UNTERWESER accepted and finally executed the contract in Bremen on November 3, 1967. (App. 21; 62).

The Collapse of the CHAPARRAL

On January 5, 1968, BREMEN departed Venice, Louisiana, and proceeded into the Gulf of Mexico with CHAPARRAL in tow. The flotilla was en route to the Adriatic when, during the early morning hours of January 9, 1968, in international waters (App. 22), the legs of the CHAPARRAL collapsed and fell into the sea. Thereafter, BREMEN rendered salvage services and, upon orders from ZAPATA, proceeded toward Tampa Bay, the nearest port of refuge.

Upon arriving in Tampa Bay on January 12, 1968, BREMEN was arrested by the United States Marshal and served with ZAPATA's Complaint seeking damages in the amount of $3,500,000 against BREMEN and UNTERWESER. (App. 7).

The Initial Proceeding

On January 29, 1968, UNTERWESER filed its Motion to Dismiss for Lack of Jurisdiction, or Alternatively, for Entry of an Order Declining Jurisdiction and/or Staying the Further Prosecution of [the Initial Proceeding]. (App. 19). This motion was based on paragraph 8 of the General Towage Conditions in the Towage Contract:

> Any dispute arising must be treated before the London Court of Justice. (App. 27).

The parties completed arrangements for security, ZAPATA ultimately accepting a letter of undertaking in the amount of $3,500,000; pursuant thereto, BREMEN was released from arrest on January 26, 1968.[2]

London Action

In accordance with the Towage Contract, UNTERWESER instituted action against ZAPATA in the High Court of Justice in London.[3] On February 21, 1968, the

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[2] The letter of undertaking was issued under the signature of Lamorte, Burns & Co., Inc. One condition of the letter was that UNTERWESER gave up no rights in connection with any defenses to the action by ZAPATA; specifically mentioned were rights of UNTERWESER to challenge jurisdiction and to petition for limitation of liability. (App. 17).

[3] UNTERWESER's suit sought affirmative relief against ZAPATA for breach of the contract, damages for loss of towing gear, and for towage hire due.

High Court of Justice issued a writ of summons which was served upon ZAPATA on March 14, 1968. (App. 46; 48). ZAPATA appeared in the London action and moved to dismiss; its motion was predicated on three principal grounds: (1) the English Court was not a convenient forum; (2) proceedings between the parties had previously been commenced in the United States; and (3) the writ was not properly served. The High Court of Justice ruled that the writ of summons had been properly served, that it had jurisdiction and that the action should go forward. (Opinion, High Court of Justice, App. 206). ZAPATA immediately appealed the ruling to the English Court of Appeal. The ruling was affirmed, the Court of Appeals holding that the forum provision of the Towage Contract was reasonable and that no showing had been made by ZAPATA which would compel refusal to enforce the contractual expectations of the parties. (App. 215).

Limitation Proceeding

While ZAPATA was contesting the action in London, the parties prepared for argument on UNTERWESER's Motion to Decline Jurisdiction or for Stay of the initial action in Tampa. At oral argument, on April 29, 1968, UNTERWESER advised the District Court of the initiation of the London action. *UNTERWESER also offered that all security given to ZAPATA in the initial action would remain available to satisfy any relief granted in any action or counterclaim by ZAPATA in London.* Following oral argument, the District Court reserved ruling on UNTERWESER's Motion.

By July 2, 1968, almost six months following the occurrence of the casualty, the District Court had not ruled on UNTERWESER's Motion and UNTERWESER

was confronted with expiration of the six-month period for filing of a limitation proceeding in the United States (the casualty having occurred January 9, 1968). The High Court of Justice had held that UNTERWESER's London action was properly brought and that the Towage Contract should be enforced, but ZAPATA was appealing that decision. Faced with the possibility of adverse rulings in the District Court and in the English Court of Appeal, *and to protect its limitation rights*, UNTERWESER filed its limitation action. (App. 85). A bond for $1,390,000 was posted[4] and the District Court entered an Order in the limitation action staying the initial suit brought by ZAPATA. (App. 94; 97).

On July 23, 1968, the English Court of Appeal affirmed the ruling of the High Court of Justice (App. 215), and on July 29 (approximately 17 days following expiration of the statutory period for petitioning for limitation) the District Court ruled on UNTERWESER's Motion to Decline Jurisdiction or Stay in the initial action; its Order denied the relief requested. (App. 80).

After entry of the adverse appellate decision in the English proceeding, ZAPATA filed Motion for Injunction in the Tampa limitation proceedings seeking to enjoin UNTERWESER from further prosecution of the London action. (App. 118). UNTERWESER again sought to enforce the forum provision of the Towage Contract by filing a Motion to Stay the limitation action pending determination of UNTERWESER's London action against ZAPATA. (App. 205).

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[4] This bond was filed in compliance with Title 46 U.S.C. § 185, 49 Stat. 1480, and the $1,390,000 was in addition to the $3,500,000 security furnished by the letter of undertaking.

The District Court, not viewing the provisions of the Towage Contract as relevant, denied UNTERWESER's Motion for Stay and at the same time granted ZAPATA's Motion and enjoined further prosecution of the London action. From this Order UNTERWESER appealed to the United States Court of Appeals for the Fifth Circuit.

The Opinion of the Court of Appeals

The Opinion of the United States Court of Appeals for the Fifth Circuit is ambiguous with respect to the grounds for affirmance; it first cited its holding in *Carbon Black Export, Inc. v. The S. S. Monrosa*, 254 F.2d 297 (5th Cir. 1958), cert. dismissed, 359 U.S. 180, rehearing denied, 359 U.S. 999 (1959), quoting therefrom the following as representing the "majority view" (App. 239, n. 26):

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non-conveniens. Any consideration of such a question starts with the *universally accepted rule that agreements in advance of controversy, whose object is to oust the jurisdiction of the Courts, are contrary to public policy and will not be enforced.* (Emphasis supplied).

In addition to relying on *Carbon Black*, the Court struck down the forum clause as unreasonable (and thus only unenforceable) on the basis of *forum non-conveniens:*

> It is within the sound discretion of the District Court to decline jurisdiction on the basis of forum non-conveniens. But apart from the forum selection clause itself the circumstances supported a retention and determination by the District Court.

> Though the towage contract envisioned a long voyage with potential exposure to the jurisdiction of numerous states, the flotilla never escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the District Court. (Footnotes omitted) (App. 241-242).

Finally, the Court, placing great emphasis on the fact that ZAPATA was a United States citizen, held "[t]he discretion of the District Court to remand the case to a foreign forum was consequently limited", "noting" that there were "*indications*" that ZAPATA's substantive rights would be "materially affected" if the dispute was litigated in an English Court since the Towage Contract contained certain "exculpatory provisions" which, ". . .are apparently contrary to public policy and unenforceable in American courts", (footnote omitted) citing *Bisso v. Inland Waterways Corporation*, 349 U.S. 85 (1955) (App. 243) and also relying upon Reese, *The Contractual Forum: Situation in the United States*, 13 Am.J.Com.L. 187, n. 33 (1964):

> [E]ffect should be denied the clause if there is reason to believe that the courts of the selected state would deal unfairly with the plaintiff or would deny him relief to which he is entitled. (App. 244).

Upon Rehearing, En Banc, a divided Court (8 to 6) affirmed, per curiam, and adopted the opinion of the original panel. (App. 283).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is ambiguous. It cannot be determined whether the Court, relying on *Carbon Black Export, Inc. v. The SS Monrosa*, 254 F.2d 297 (5th Cir. 1958), held that the forum provision in the Towage Contract was *per se* invalid as an attempt to oust the court from its jurisdiction, or whether (after

testing the forum provision solely against criteria of *forum non-conveniens*) held that the provision was unreasonable and therefore only unenforceable. Upon either basis the decision is erroneous. Reliance upon *Carbon Black* is unwarranted in view of significant factual and legal distinctions; further, such reliance ignores commercial realities and principles of contract and comity in international business relations. Testing the forum provision by exclusive application of *forum non-conveniens* leads to the fundamental error committed in both lower courts: casting the burden of showing reasonableness upon UNTERWESER. Law and logic require that ZAPATA, the party seeking to escape its contractual committment, must bear the burden of showing that the forum provision is *unreasonable*. Moreover, exclusive application of *forum non-conveniens* disregards the fact that the forum clause was bargained-for consideration.

I. If the Court of Appeals means that forum provisions are *per se* invalid, the decision contravenes recognition of the *prima facie* validity of such clauses by this Court in *National Equipment Rental v. Szukhent*, 375 U.S. 311 (1964). The Court of Appeals' additional reliance on *Indussa Corp. v. S/S RANBORG*, 377 F.2d 200 (2nd Cir. 1967), in which the Court overruled its prior decision in *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (1955), was misplaced. *Indussa's* rejection of *Muller* was based solely upon the statutory prohibitions of the Carriage of Goods by Sea Act, 46 USC §§1300-15, 49 Stat. 1207 (COGSA), necessitated by the adhesive character of bills of lading. COGSA was applicable both to *Muller* and to *Carbon Black*; both decisions were dictated by COGSA and not by principles of general contract law. The argument

that forum clauses generally, (and particularly where the contract was potentially subject to the intermittent jurisdiction of several soverigns), are designed to oust a court's jurisdiction is no longer valid and ignores compelling considerations of international commercial relations. A forum clause negotiated under the circumstances in the present case is not *per se* an "affront to the judicial power, which must be stricken down." *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966).

II. The reasonableness of a contractual forum provision arrived at through arms-length negotiation by parties regularly engaged in international transactions can not be determined through concepts of "convenience," "national origin," or pure jurisdictional "power." Application of *forum non-conveniens* ignores the fact that *the* initial choice of forum was London - not Tampa: the former was contracted for - the latter fortuitous. The burden of showing that the contracted forum is unreasonable must be on the party seeking to avoid contractual obligations, *not upon the party seeking to perform.* Forum provisions must be judged by facts existing at the time of contract and not on the basis of hindsight, fortuitous circumstances, pure convenience, or national origin of either party. This crucial distinction differentiating forum provisions from *forum non-conveniens* was recognized by Judge Wisdom in his dissent where he delineated the controlling standards applicable to testing the reasonableness of such clauses (App. 268-269): (1) Did the parties freely and intelligently enter into the agreement? (2) Would the stipulated forum, in rendering its decision, transgress an im-

portant public policy in the present forum? (3) Would the designated forum adjudicate the parties' dispute? (4) Is the designated forum *seriously* inconvenient for the trial of the action? American courts and especially this Court should approach forum clauses affirmatively, as have the English Courts in this case, that is, with a view to their *prima facie* enforcement absent: (1) a contract of adhesion, or (2) compelling and serious public policy considerations.

III. The Court of Appeals' decision fosters uncertainty in the field of international commercial transactions where United States citizens are a party, and distrust of United States courts stemming from application of out-dated concepts which substitute unbridled "jurisdictional discretion" based upon a combination of national origin and fortuitous circumstances for the contractual expectations of the parties. The suggestion that ZAPATA's rights would be prejudiced or that it would be treated "unfairly" in fulfilling its contractual committments, freely and voluntarily assumed, represents a rejection of international judicial comity and does not enhance or strengthen judicial or national sovereignty.

ARGUMENT

I

EFFECT SHOULD BE GIVEN TO THE CHOICE OF FORUM CLAUSE IN A PRIVATE EXTRA-NATIONAL TOWAGE CONTRACT EXECUTED BY PARTIES OF DIFFERENT NATIONALITIES AND OF EQUAL BARAINING POWER.

There is no dispute that the District Court had "jurisdiction" of ZAPATA's Complaint and UNTERWESER's Petition for Limitation of Liability; rather the question is whether or not the Court, having jurisdictional power, rightly exercised that power in the face of a forum provision constituting bargained-for consideration.

The Towage Contract evolved from arms-length negotiations between ZAPATA and UNTERWESER, and its provisions affected only the private interests of the contracting parties. Both knew that BREMEN and CHAPARRAL would traverse the civil jurisdiction of numerous countries.

As a matter of commercial practice, UNTERWESER's towage contracts ordinarily provide for exclusive German jurisdiction and the application of German law in the settlement of all disputes. As a contractual concession, UNTERWESER proposed the London forum as a neutral alternative which was accepted by ZAPATA.[5] UNTERWESER considered this provision

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[5] It is interesting to note that the Daywork Drilling Contract (App. 299) between Zapata North Sea, Inc., and AGIP-S.p.A. Direzione Mincraria, covering the drilling to be performed in the Adriatic Sea provides for arbitration at London, England, and interpretation and construction of the agreement ". . . in accordance with the common law of England." (App. 310-311). The Daywork Drilling Contract is a portion of the supplemental documents filed in the Court of Appeal pursuant to their request on Rehearing En Banc.

fundamental to the agreement and would not have entered the Towage Contract but for the London forum provision. (App. 21-22).

The legal basis upon which the Court of Appeals affirmed the District Court is unclear.[6] Intially, the Court of Appeals apparently relies on its decision in *Carbon Black Export, Inc., v. S.S. Monrosa,* 254 F.2d 297 (5th Cir. 1958), for the proposition that forum clauses are *per se* illegal and intended to oust courts of jurisdiction. However, the Court compounds confusion in attempting to support its decision on two alternative grounds, *relating to enforceability,* which are inherently inconsistent with a ruling that the forum clause is *per se* invalid:

> (a) the District Courts' "discretion" when confronted with a forum clause which is "unreasonable" under a purported application of the doctrine of *forum non-conveniens* (App. 241); and
>
> (b) the existence of supposed "exculpatory provisions" in the Towage Contract which, according to the Court "are *apparently* contrary to public policy and unenforceable in American Courts." (App. 242-243, Opinion). (Emphasis supplied).

Insofar as the decision holds that forum provisions are *per se* invalid against public policy, it completely disregards this Court's recognition of the validity of such clauses in *National Equipment Rental v. Szukhent,* 375 U.S. 311 (1964), and decisions of other Circuits which recognize the *prima facie* validity of such provisions:

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[6] See App. 248, Opinion, Wisdom J. dissenting.

> And, it is settled, as the courts below recognize, that parties to a contract may agree in advance to submit to the jurisdiction of a given court to permit notice to be served by the opposing party or even to waive notice altogether.
> 375 U.S. at 315-316.

The *Szukhent* decision has been implemented by a number of District Courts in recent decisions involving stipulated forum provisions. In all of these decisions the courts have held that such clauses are *per se* valid, to be rejected only when unreasonable under the circumstances. *See*: *United States v. Roscoe-Ajax Construction Co.*, 246 F.Supp. 439 (N.D. Cal. 1965) (Miller Act Prohibition); *National Equipment Rental Ltd., v. Centra Cast Co.*, 270 F.Supp. 999 (E.D.N.Y. 1967) (forum provision not *per se* invalid); *San Juan Hotel Corporation v. Lefkowitz*, 277 F.Supp. 28 (D. Puerto Rico 1967) (forum provision enforceable); *Geiger v. Keilani*, 270 F.Supp. 761 (E.D.Mich. 1967); *Hawaii Credit Corp. v. Continental Credit Card Corp.*, 290 F.Supp. 848 (D. Hawaii 1968) (forum provision enforceable when reasonable); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F.Supp. 1132 (D.Minn. 1968) (enforceable if reasonable); *Aamco Automatic Transmissions, Inc. v. Hagenbarth*, 296 F.Supp. 1142 (E.D. Pa. 1968) (forum provision enforced).

The Court of Appeals attempts to support its application of *Carbon Black* by utilization of *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2nd Cir. 1967). *Indussa* overruled *Wm. H. Muller & Co. v. Swedish American Line, Ltd.*, 224 F.2d 806 (2d Cir. 1955), in which the Court had held a forum provision calling for settlement of disputes in a Swedish court to be valid under the Carriage of Goods by Sea Act, 46 U.S.C. §§1300-15, 46 Stat. 1207 (COGSA). In relying upon the Second Circuit's

Indussa decision, the Court of Appeals fails to recognize that *Indussa* in overruling *Muller*, did so *solely* on the basis of the statutory prohibition of COGSA and not on principles of general contract law. The effect of *Indussa* was correctly analyzed in the original dissent. (App. 256-257):

> I must disagree with the majority's conclusion that Indussa Corporation v. S. S. Ranborg, 2 Cir. 1967, 377 F.2d 200, overrules this part of Muller. Indussa's decision not to enforce a forum clause derived from its view that the Carriage of Goods by Sea Act, 46 U.S.C. §§1300-15, where applicable, prohibited such clauses. COGSA did apply to Muller (as it did to Carbon Black) and for that reason Muller was overruled. "[T]he Muller court leaned too heavily on general principles of contract law and gave insufficient effect to the enactments of Congress governing bills of lading. . ." 377 F.2d at 202. Where COGSA does not apply as in this case, I believe Muller's "general principles of contract law" still lead to Muller's result. (Footnotes deleted).

This same distinction is ably discussed in Denning, *Choice of Forum Clauses in Bills of Lading*, Journal of Maritime Law and Commerce (Vol. 2, No. 1, p. 17, Oct. 1971), wherein the author raises serious questions concerning the desirability of even the COGSA prohibition.[7] Where COGSA is inapplicable, the Second Circuit recognizes that forum provisions under general contract law are enforceable and has characterized this Court's hold-

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[7] Denning's article prompted a reply by Allen I. Mendelsohn: *Liberalism, Choice of Forum Clauses and the Hague Rules*, Journal of Maritime Law and Commerce (Vol. 2, No. 3, April 1971). Mendelsohn's defense of the COGSA forum clause restriction further emphasized the distinction by pointing out bills of lading are contracts of adhesion which require consideration of commercial and practical realities of a nature different from contracts arrived at through arms-length negotiations.

ing in *Szukhent* as evidencing ": . . , a federal policy in favor of upholding such clauses. . ." *National Equipment Rental, Ltd., v. Reagin,* 338 F.2d 759, 762 (1964). Similarly, the Third Circuit has held that reasonable forum clauses in contracts are enforceable and not ". . .an affront to the judicial power which must be stricken down." *Central Contracting Co. v. Maryland Casualty Co.,* 367 F.2d 341, 345 (1966).

Judged in the factual context of this case, the argument that forum clauses are intended to divest any Court of jurisdiction defies logic. The negotiations leading to execution of the Towage Contract contemplated a lengthy voyage traversing the waters of many jurisdictions. Both parties presumably anticipated a successful voyage and if they contemplated difficulties, neither could forsee where they might occur. The damage to the CHAPARRAL occurred in international waters and not within the jurisdiction of the District Court. BREMEN, on orders from ZAPATA, entered the Port of Tampa and was seized by the United States Marshal on arrival. Accordingly, the jurisdiction of the District Court is wholly fortuitous and neither party at the time of contract could have intended to divest the jurisdiction of the Tampa Court or of any Court along the route of the journey.

The forum provision in the Towage Contract was a compromise forming an essential part of the bargain, and, unlike standard provisions in bills of lading to which COGSA prohibitions apply, was negotiated between two independent parties sophisticated in international transactions. Under such circumstances, enforcement of forum provisions and the contractual expectations of the parties must be approached affimative-

ly with a view to giving effect to the written contract.[8] The logic and fundamental rationale underlying these principles was succinctly summarized in *Gilbert v. Burnstine,* 174 N.E. 706, 707 (N.Y. 1931):

> Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. Unless individuals run foul of constitutions, statutes, decisions, or the rules of public morality, why should they not be allowed to contract as they please? Our government is not so paternalistic as to prevent them. Unless their stipulations have a tendency to entangle national or state affairs, their contracts in advance to submit to the process of foreign tribunals partake of their strictly private business. Our courts are not interested except to the extent of preserving the right to prevent repudiation.

This same conclusion was reached and simply stated by Mr. Justice Karminski in the High Court of Justice Judgment which was entered in this case (App. 213):

> But I have approached the matter with, I hope, an unprejudiced mind - that is, unprejudiced by past history - and I have come to the clear conclusion here that the parties should, even after giving full consideration to the matters of convenience and the other matters concerned here, stick to their bargain.

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[8] *See: Central Contracting Co. v. C. E. Youngdahl & Co.,* 209 A.2d 810 (Pa. 1965); *Krenger v. Pennsylvania R. Co.,* 174 F.2d 556 (2d Cir. 1949) (concurring opinion); *Mittenthal v. Mascagni,* 66 N.E. 425 (Mass. 1903).

Any contention that forum clauses are *per se* "invalid and against public policy" as a divestment of jurisdiction is archaic. Surely no meaningful distinction can be suggested between forum and arbitration clauses; historically, arbitration clauses were subject to the same specious reasoning on which the forum clause in this case was struck down; today, agreements to arbitrate are universally held valid and enforceable.[9]

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[9] Ehrenzweig, Conflict of Laws, §§41,153 (1962); Restatement (Second) of Conflict of Laws, §80 (Proposed Off. Draft 1967); *Krenger v. Pennsylvania R.R. Co.*, 174 F.2d 556, 561 (2d Cir. 1949) (L.Hand, J., Concurring); Application of the Forum Clause to Commercial Contracts, 8 Houston L.Rev. 738 (1971); Collins, *Forum Selection and an Anglo-American Conflict — The Sad Case of the CHAPARRAL*, International and Comparative Law Quarterly (Vol. 20, p. 550, July 1971).

II

THE BURDEN OF PROVING A FORUM CLAUSE UNREASONABLE RESTS ON THE PARTY SEEKING TO AVOID ENFORCEMENT AND UNREASONABLENESS IS NOT DETERMINED BY APPLICATION OF FORUM NON-CONVENIENS.

The burden of proving a forum clause unreasonable rests on the party seeking to avoid enforcement and unreasonableness is not determined by exclusive application of the doctrine of *forum non-conveniens*. Not content with simply striking down the forum provision as invalid *per se*, the Court of Appeals, through exclusive application of *forum non-conveniens* determined that the clause in question was unreasonable, surprisingly citing *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966) (App. 243-244 n.40), which case holds that forum clauses are *prima facie* valid and are not to be tested by application of *forum non-conveniens*. *Forum non-conveniens* is not the exclusive test of reasonableness; the burden of proof of reasonableness is not upon the party willing to perform. *Central Contracting* correctly applied the standard of reasonableness but unequivocably held that the burden of proof was on the party seeking to annul the contract. The application of the doctrine of *forum non-conveniens* "... the standard for which is that the plaintiff's [ZAPATA] choice of forum 'should rarely be disturbed' unless 'the balance is strongly in favor' of the defendant," (App. 278-279, Opinion, Wisdom, J., dissenting), *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947), wrongly casts the burden on UNTERWESER rather than ZAPATA.

The proper legal approach is succinctly stated by Judge Wisdom:

> I submit that when a forum clause is involved our standard should be not to disturb the *contractual* choice of forum unless 'the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action.' Restatement (Second) Conflict of Laws, §80, Comment, *supra,* note 5. From this perspective I conclude that factors of convenience do not justify refusing the motion to decline jurisdiction. (Emphasis by Judge Wisdom). (App. 278-279).

Forum non-conveniens is a doctrine applied after the fact - when a dispute has developed and litigation is in progress. Therefore it cannot logically be applied to test the reasonableness of a forum contracted for in advance of a dispute in an effort by the parties to provide certainty in an international transaction. Reliance on the doctrine of *forum non-coveniens* simply ignores practical considerations in the minds of the parties when they selected the "initial forum". Here, for pragmatic commercial reasons, the initial choice was London and not Tampa and inclusion of the forum provision in the Towage Contract was an essential ingredient for the consideration bargained-for by UNTERWESER. (App. 22). These commercial realities were recognized in the dissent on Rehearing (App. 290-291):

> The decision of the majority is a backwards step by a forward-looking court. It has no place in a shrinking world where international commercial transaction are becoming increasingly commonplace. The safeguard against abuse of a forum clause is the local court's power to determine the reasonableness of enforcing the clause. But the burden of proving unreasonableness should fall on the party seeking

to escape from the obligation he contracted to undertake. ZAPATA has failed to show any good reasons for backing out of its bargain.

Absent guidelines, the approach of the lower courts to contractual forum clauses has been essentially the same as the approach to COGSA forum clauses. The decisions represent the application of unbridled discretion rather than discretion governed by realistic commercial and contract principles. As noted in Denning, *Choice of Forum Clauses in Bills of Lading,* Journal of Maritime Law and Commerce (Vol. 2, No. 1, p. 30-31, Oct. 1971) the difference between decisions has been solely one of attitude:

> At the same time, there were COGSA decisions which followed the spirit as well as the letter of Muller. [224 F.2d 806 (2d Cir. 1955)] Thus in Takemura & Co., Ltd., v. SS Tsuneshima Maru, [197 F.Supp. 909 (1961)] a case of a voyage from New York to Japan, a clause giving exclusive jurisdiction to the Japanese courts was enforced. In Pakhuismeesteren S.A. v. S.S. Goettingen, [225 F.Supp. 888 (1963)], the court enforced a clause giving exclusive jurisdiction to the courts of Hamburg, the voyage being from New York to Antwerp. In New York Underwriters Insurance Company v. M. S. Wurtemberg, [235 F.Supp. 909 (1964)] the court declined jurisdiction as a result of a clause providing for decision by German courts. These cases seem to treat choice of forum clauses as prima facie enforceable. They did not insist, as the court in Sociedade Brasiliera [135 F.Supp. 394 (1955)], insisted, on an absolute identity between the courts chosen and the governing law. They did not, as in Sociedade Brasiliera and Carbon Black [254 F.2d 297 (1958) at 301] regard the Muller [supra] doctrine of reasonableness as synonomous with the doctrine of forum non-conveniens. They did not give excessive weight to the nationality of the libellant.

[cf. Insurance Company of North America v. N.V. Stoomvaart, 201 F.Supp. 76 (1961)]. They seemed to ignore the limitations which had been placed on Muller. In the end, the difference was one of attitude. A hostile court could always find reasons for not following Muller. A court which accepted the liberal Muller approach could follow it, by ignoring the hostility shown by other courts. (footnotes omitted).

Naked concepts of "convenience," "national origin," or jurisdictional "power" have no place in determining reasonableness of forum clauses negotiated in international commerce.

The guidelines proposed in the dissent are essentially those utilized by the English courts.[10] The relevant standards, "... where parties have selected a forum without benefit of hindsight or fortuitous circumstances should be:

1. Did the parties freely and intelligently enter their agreement? * * *

2. Would the stipulated forum, in rendering its decision, transgress an important public policy of the present forum? * * *

3. Would the designated forum adjudicate the parties' dispute? * * *

4. Is the designated forum seriously inconvenient for the trial of the action? (App. 267-281).

Applying the first criterion, the record failed to show that ZAPATA had in any way been overreached. "... Perhaps more evidence could be accumulated, but

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[10] See: *The ELEFTHERIA*, P. 94 (1970), 1 Lloyd's Rep. 237 (1969), 2 All. E.R. 641 (1969). The forum clause of the Towage Contract has been tested and found acceptable and enforceable under English guidelines. (App. 206 Opinion, High Court of Justice; App. 216, Opinion, English Court of Appeal).

under this evidence ZAPATA has not met the burden of showing that it was pressured into the forum stipulation." (App. 271, Opinion, Wisdom, J., dissenting). ZAPATA presented no evidence of fraud or overreaching and throughout the proceeding has suggested none; UNTERWESER offered the lowest bid of several submitted;[11] the Towage Contract was negotiated and not a contract of adhesion — ZAPATA itself made alterations which were accepted in Bremen.

The dissent, in applying the second criterion, correctly concludes that no important public policy of the United States is transgressed or at issue. The majority opinion, on the other hand, categorizes the following clauses of the Towage Contract as exculpatory and accordingly in violation of public policy enunciated in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85 (1955), and *Dixilyn Drilling Corporation v. Crescent Towing and Salvage Co.*, 372 U.S. 697 (1963):[12]

> ... URAG (Unterweser), their Masters and Crews, are not responsible for defaults and/or errors in the navigation of the tow.
>
> * * *
>
> Damages suffered by the towed object are in any case for account of its Owners. (App. 26).

The dissent considered the argument of the majority and concluded that adjudication by the High Court of Justice provided ZAPATA with an adequate remedy and violated no important public policy. Judge Wisdom noted

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[11] Unterweser $1900 a day; Wijsmuller $3100 a day; Moran $3400 a day. (App. 295-298).

[12] *Dixilyn* was determined on "authority" of *Bisso*. (App. 272, n.29, Opinion, Wisdom, J., dissenting).

that *Bisso* was intended to protect against inequality of bargaining and to discourage negligent conduct within the boundaries of the United States. Since the bargaining power was at least equal, and the casualty occurred in international waters, Judge Wisdom determined that rejection of the forum provision on grounds of public policy represented an unwarranted extension of *Bisso*. (App. 272-273). Indeed, had ZAPATA honored its contract and complied with its terms, the United States Courts would have had no opportunity to consider the public policy in question.

Refusal to enforce the forum provision on the basis of *Bisso* and *Dixilyn* necessarily presumes that the British Courts would: (1) apply the law of England; (2) find UNTERWESER guilty of negligence on the merits and (3) construe the clauses in question as exonerating the guilty party. Such a presumption at this juncture in the litigation is premature and speculative. In the first place, it is not certain that the British Courts would find that a choice of forum provision necessarily reflects a choice by the parties that the law of the forum shall apply to the contract as a whole. *Compagnie Tunisienne Navigation S.A. v. Compagnie d'Armement Maritime S. A.* [1970] 3 W.L.R. 389 (House of Lords). See also: Collins, *Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England,* Journal of Maritime Law and Commerce (Vol. 2, No. 2, p. 363, Jan. 1971). Collins, *Forum Selection and an Anglo-American Conflict — The Sad Case of the CHAPARRAL,* International and Comparative Law Quarterly (Vol. 20, p. 550, 551, n. 2, July, 1971). Secondly, even assuming the application of English law, and following a trial on the merits, the High Court of Justice could very well determine that UNTERWESER was not negligent and hence not liable for

damages to the CHARARRAL. Finally, no Court, American or English, has had occasion to either construe or apply the so-called exculpatory provisions of the Towage Contract.

Judge Widsom's dissent had an additional and interesting observation on application of *Bisso, Dixilyn* and *Carbon Black* by the majority predicated purely on the fact of ZAPATA's American citizenship; he observed that insofar as public policy considerations were present,[13] they militated in favor of enforcement rather than against:

> A proper solicitation for the interest of American citizens may militate in favor of enforcing these clauses. Otherwise, Americans who wish to contract with foreign nations and who are willing to accept a forum clause will have difficulty in convincing the foreign party that he can rely on the agreement. (App. 275-276):

The third factor, whether the designated forum would adjudicate the parties' dispute, has clearly been answered in the affirmative by the Court of Appeal in London.

In considering the fourth factor, serious inconvenience, courts must carefully avoid allowing this criterion from becoming simply "another label for the doctrine of *forum non-conveniens,*" (App. 269, Opinion, Wisdom, J., dissenting).

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[13] The public policy against limitation of liability clauses would not appear to be so entrenched as the Court of Appeals indicates since such clauses have been enforced in diversity cases where economic and practical realities justify them. *Seaboard Coastline R.R. v. Tennessee Corp.*, 421 F.2d 970 (5th Cir. 1970). See also: Zammit, *The Validity of the "Pilotage Clause" in Docking Assistance Contracts*, Journal of Maritime Law and Commerce (Vol. 3, No. 1, p. 71, Oct. 1971).

A determination as to whether the stipulated forum is seriously inconvenient must be made in light of the circumstances *existing at the time of contract*. The emphasis must be upon circumstances existing before the fact of casualty or dispute; otherwise, forum clauses constituting bargained-for consideration could be overlooked and submerged by inapposite considerations of "number" and "location" of witnesses and documents. The contractual forum should not be disturbed on the basis of citizenship or fortuitous circumstances; it should be disturbed only in cases of serious inconvenience to the parties, and such inconvenience is not present in this case:

> It is true that depositions of the German crew members are available because Zapata obtained them immediately after filing its libel. But if, as is likely, Zapata's witnesses are its crewmen (on the Chaparral) and Unterweser's witnesses are its crewmen (on the Bremen), the inference from the observation is that Zapata should have live witnesses at trial while Unterweser relies on depositions. Presumably depositions of the American witnesses could be taken for an English trial, or both sides face the same difficulty of transporting their witnesses. Although the voyage began here and the casualty occurred nearby, the tug was built in Germany and had its home port in Bremen. As the High Court of Justice observed, 'There is probably a balance of numbers in favor of the Americans, but not, as I am inclined to think, a very heavy balance.' The fact that no contacts exist with the English forum is not determinative. That forum was chosen as a logical compromise should a dispute arise. The English court has the advantage of dividing the inconveniences between the disputants. (App. 279, Opinion, Wisdom, J., dissenting). (Footnotes omitted).

Furthermore, with respect to serious inconvenience, there is no showing that either party would gain procedural advantage by virtue of adjudication by the London courts. If any party has been prejudiced in this case, it has been UNTERWESER. In the length of time it took the District Court to determine and rule upon UNTERWESER'S original motion for stay (filed January 29, 1968), the English trial court accepted jurisdiction of the cause, dealt with and determined the legal issues pending before this Court, and was affirmed by the English Court of Appeal. (App. 206, 215). Moreover, the delay occasioned by the proceedings in Tampa forced UNTERWESER to protect its limitation rights, which fact was seized upon by the majority to support its decision:[14]

> The contention that Unterweser should be treated as having assented to the jurisdiction of the local court by filing the limitation action is a red herring. In the first place, Unterweser (more accurately, the tug Bremen) left international waters to enter the district court's jurisdiction *upon the instructions of Zapata*. Conveniently, Zapata had a United States marshal waiting to arrest the Bremen when the tug entered Tampa Bay with the disabled Chaparral (the drilling rig). And when Unterweser proceeded to move the district court to dismiss the suit, the district court failed to rule on its motion *until after the statutory period for filing a limitation action had elapsed*. Unterweser had already sued in London for breach of contract. Prior to the limitation action, the High Court of Justice had ruled that Zapata had been properly served and that the action should proceed in the English courts. (Footnote deleted) (App. 287, Opinion, Wisdom, J., dissenting). (Emphasis by Judge Wisdom).

[14] See: Note, 39 Cinn. L.Rev. 819 (1970), which correctly characterizes the Court of Appeals' decision in this regard as a preversion of the purpose of a limitation proceeding.

Nor does satisfaction of judgment pose any problem, Unterweser having offered to make available the security posted in Tampa to satisfy any judgment obtained by Zapata in London.

The finding of the District Court, affirmed by the Court of Appeals, that:

> Defendant has not suggested and there is no showing that American courts are not capable of adjudicating this case fairly and justly. The balance of convenience here is not strongly in favor of defendant and plaintiff's choice of forum should not be disturbed. (App. 82).

(1) misplaces the burden of proof; (2) fails to apply the appropriate tests; (3) ignores the *initial choice of forum* which was contracted for and represented bargained-for consideration.

III

THE DECISION BELOW REJECTS PRINCIPLES OF UNIFORMITY AND COMITY IN INTERNATIONAL LAW AND FOSTERS DISTRUST OF AMERICAN COURTS AND CONTRACTUAL COMMITMENTS INVOLVING AMERICAN CITIZENS.

Uniformity of international law is a desirable objective insofar as it does not require a United States Court to relinquish its sovereignty. *Standard Oil Company v. United States,* 340 U.S. 54 (1950); *Aetna Insurance Company v. United Fruit Company,* 304 U.S. 430 (1938). Federal courts do recognize the competency and validity of foreign tribunals and extend to them the comity which they are due:

> ... We observe that fundamental principles have been lost sight of. *The issue is not one of jurisdiction, but one, almost as important when a foreign sovereign is involved, of comity.* The presence of the parties confers on the district court jurisdiction to act, Cole v. Cunningham, 1890, 133 U.S. 107, 121, 10 S. Ct. 269, 33 L.Ed. 538, but the direct effect of the district court's action on the jurisdiction of a foreign sovereign requires that such action be taken only with care and great restraint. See Donovan v. City of Dallas, 12 L.Ed. 2d 409. We have only recently pointed out the comity which the federal courts owe to courts of other jurisdictions. Hayes Indus., Inc. v. Caribbean Sales Associates, Inc., 1 Cir. 1968, 387 F. 2d 498. See Also Toucey v. New York Life Ins. Co. 1941, 314 U.S. 118, 62 S. Ct. 139, 86 L.Ed. 100. The Congressional policy upon which 28 U.S.C. §2283 is based should, a fortiori, be reflected by a self-imposed reluctance to interfere with courts of foreign countries. *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.,* 412 F.2d 577, 578 1st Cir. 1969) (emphasis added)

Recognition of comity by the lower courts in this case would have given effect to the contractual expectations of the parties, would not have subjected either party to unanticipated hardship or inconvenience and would not have done violence to the jurisdiction or integrity of a United States court.

While the decision below is erroneous from a legal standpoint, its most far reaching effect is in the area of conflict of laws in international trade. The profound adverse effect of the Fifth Circuit's opinion in *this case* on commercial relations and private international law has been assessed by one commentator as follows:

> A recent series of litigation in England and the United States has taken a course which must give rise to serious misgivings among private international lawyers — for in this litigation the federal courts of the United States have arrogated to themselves jurisdiction and indicated they would apply American law in a case where two parties, at arms-length and with equal bargaining power, chose English jurisdiction and avoided a choice of American law.
>
> * * *
>
> A mere recitation of these essential facts must cause disquiet. The federal court exhibited a very real and profound lack of understanding of international commercial transactions. It did not appear to have any knowledge of the fact that the business men who enter into contracts of this kind know their law and they know their courts. If a particular law or a particular forum is chosen certain consequences follow. In this case, the English courts were chosen as a reasonable compromise. The German company must be taken to have known that the exculpatory clauses would be given effect in England and must have made insurance arrangements accordingly.

> Similarly it can hardly be doubted that the American company made insurance arrangements on the basis of the efficacy of the contract.
>
> * * *
>
> The American federal court entirely failed to appreciate that choice of jurisdiction in an international commercial transaction is not a minor clause relating to machinery but very often a vital factor in negotiations. Every practitioner must know of cases where contracts would never have been entered into but for the choice of some particular law or jurisdiction. If such choices are to be so freely disregarded the whole point of having a rational system of private international law will have disappeared.[15]

More distressing is the relentless emphasis placed by the Fifth Circuit upon the American citizenship of ZAPATA coupled with the surprising suggestion that an American citizen might not receive a fair hearing in an English court. Such provincialism is completely unacceptable on an international level: English courts have through centuries enjoyed the reputation of efficient and impartial administration of justice, especially in commercial and admiralty matters, a reputation which remains untarnished. Further, any suggestion that the English courts could not fairly administer a maritime case is unthinkable, for:

> . . . it is not uncommon in the shipping world to find foreign shipowners in their contracts agreeing that any dispute between them shall be decided by the

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[15] Collins, *Forum Selection and An Anglo-American Conflict — The Sad Case of the CHAPARRAL*, International and Comparative Law Quarterly (Vol. 20, p. 550, July 1971), at pages 550, 556, 557.

English commercial court according to English law. *Tzortzis v. Monark Line A/B* (1968) 1 All. E. R. 949, 952.

Surely, under circumstances of this case, United States public policy dictates that its courts give effect to the principle of comity by exercising restrained judicial discretion encouraging implementation of the contractual expectations of parties to an extra-national contract. Only through recognition of such principles will United States Courts be able "... to keep the law at a grade at least as high as the standards of ordinary ethics." *Gilbert v. Burnstine,* 174 N.E. 706, 707 (N.Y. 1931).

CONCLUSION

Accordingly, it is respectfully submitted that this Court should reverse the United States Court of Appeals for the Fifth Circuit, and remand the case with instructions to stay the Tampa action and relegate the parties to the London forum for which they contracted.

Respectfully submitted,

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